

ORIGINAL

BEFORE THE

## Federal Communications Commission

WASHINGTON, D.C.

In the Matter of

GC Docket No. 92-52

RECEIVED

Reexamination of the Policy

RM-7739

Statement on Comparative

RM-7740

Broadcast Hearings

RM-7741

OCT 13 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

COMMENTS ON FURTHER NOTICE OF PROPOSED RULEMAKING

The Federal Communications Bar Association (the "FCBA")<sup>1/</sup> hereby submits its comments in response to the Further Notice of Proposed Rulemaking (the "Further Notice") in the above-referenced proceeding. For the reasons set forth below, the FCBA supports the Commission's suggestion that the holding period for construction permits be extended in circumstances where applicants have relied on comparative promises for the award of the construction permit. However, in other circumstances, where the integrity of the Commission's processes is not at stake, the FCBA does not see any compelling reason for the imposition of any holding period.

DISCUSSIONConstruction Permits Awarded Through Comparative Hearing

1. In the Further Notice, the Commission proposes to lengthen the mandatory holding period from one year to three

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The FCBA has commented in every phase of this proceeding. As the FCBA's membership consists of more than 1400 attorneys involved in telecommunications law practice, these Comments do not necessarily represent the views of each and every FCBA member.

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years for stations constructed pursuant to authorizations obtained through the comparative hearing process. In support of this extension of the holding period, the Commission relies upon two interrelated justifications. First, the Commission notes that an extension appears warranted to insure that the integrity of the comparative hearing process is preserved, i.e., that persons who make comparative promises do not do so lightly, but are instead bound by their commitments. Second, the Commission foresees the public interest benefitting from the extended period of ownership by those with the traits that are preferred in the comparative hearing process.

2. The FCBA is on record as supporting a longer holding period for stations constructed by applicants who prevail as the result of the comparative hearing process. This position is based on the FCBA's belief that the longer holding period contributes to the integrity of the Commission's processes. While the FCBA has not in the past favored any particular selection criteria as best promoting the public interest, as different practitioners with differing client interests may disagree, the FCBA has been a strong supporter of the Commission enforcing whatever criteria it adopts for evaluating comparative applicants. If parties are to litigate under a given set of criteria, and these criteria result in the comparative selection of one applicant over another, the winning party should be held to that commitment to protect the integrity of the process, and to give meaning to the litigation.

3. Thus, in its comments in Docket 89-15, the proposal to select among mutually exclusive broadcast applicants by the use of a lottery, the FCBA specifically stated that it favored the lengthening of the holding period. See FCBA Comments in Docket 89-15, filed May 31, 1989, at 35-40. The FCBA there supported the extension of the holding period to at least two years. A period of at least that length insures that comparative promises are not lightly made, but are instead meaningful, long-term commitments of the applicant. The FCBA continues to believe that this extension is warranted, and thus supports the Commission's proposal in the Further Notice.

The Extended Holding Period Should  
Only Apply to Applications Granted After a Hearing

4. The Commission requests comments as to whether a holding period should be imposed in other circumstances where applicants receive a grant of a construction permit for a new station. Specifically, the Commission's inquiry concerns authorizations awarded as a result of a settlement in a comparative hearing. The Commission notes that no holding period is presently imposed on authorizations awarded in this manner.

5. The FCBA does not support such an extension of the holding period. The FCBA, as stated above, favors the extension of the holding period principally as a method of binding comparative applicants to their promises, and insuring that these promises are not lightly made. In instances where there are settlements, and where the surviving applicant is not required

under Commission rules or policy to implement any comparative commitments that it may have made, there is no promise to which the successful applicant must be bound by a mandatory holding period. Indeed, the Commission has recognized that the principal public interest benefit of such settlements is the expeditious institution of a new service, not the implementation of ownership integration or station divestiture commitments. Therefore, the necessity for any holding period, much less one three years long, appears to be missing.

6. Moreover, the practitioners who make up the FCBA have noted that settlements in comparative hearing cases are becoming more difficult to achieve, particularly where there are multiple committed applicants for a given frequency. As settlement payments in excess of expenses have been prohibited, committed applicants are usually unlikely to abandon their applications in exchange for a simple reimbursement of expenses. Thus, in many cases the only practical route to a settlement to avoid the delays and expenses inherent in the comparative hearing process is through merger, where competing applicants come together to form a joint entity to hold the license. In these instances, the resulting "shotgun weddings" do not always produce stable marriages. The parties, who may never have met prior to the hearing, were initially in an adversarial position, and certainly never planned to join with each other in a business relationship prior to the hearing, do not always view the operation of the station in the same manner. Under current policy, if such

relationships fall apart, the "marriage" can be dissolved and the station can be sold either to one of the partners or to a third party. It would serve no one's interest to force applicants brought together in such circumstances to live together for some arbitrary holding period, as feuding partners are unlikely to produce a healthy station best able to serve the public interest.

7. Thus, the FCBA opposes the extension of any holding period to grants made in situations where applicants are not held by the Commission to their comparative promises.<sup>2/</sup> Where such promises are not binding on an applicant, there appears to be no public interest reason to impose an arbitrary holding period on the resulting construction permit.

Any Holding Period Should Apply Only Prospectively

8. The Commission asks in the Further Notice whether any new holding period should apply to any existing authorizations which were granted through the comparative process, or whether it should only be applied prospectively. The FCBA submits that any

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<sup>2/</sup> The Commission's recent reform of the comparative hearing process provided that comparative applicants would be routinely relieved of commitments made in connection with comparative promises if settlements occurred by the time of the exchange of the applicant's direct case exhibits. Relief from such commitments has also been granted at a later point in the comparative process in connection with mergers of competing applicants and where the public interest would otherwise be served. The FCBA submits that the holding period could be applied wherever the Commission finds that no relief from a comparative commitment is warranted. Conversely, where the Commission allows relief from comparative commitments, the holding period would not apply.

rule change should only apply to future awards of authorizations. To hold otherwise could imperil existing business relationships which have been negotiated with respect to granted permits or constructed stations, relationships which were entered into in reliance on existing law.

9. As the Commission has recognized, the present law requires only that permittees who received their construction permits through the comparative hearing process hold those permits for one year. Thus, permittees may have made financial or other business commitments based on the expectation that this one year holding period would continue to apply. For instance, investors may have provided funds to the permittee with an option or other future right to acquire an ownership interest after the station is operated for the required one year period. If such an option cannot be exercised, it is possible that the licensee or permittee could be held in default of legal obligations which were entered into in good faith. To avoid the contractual problems which could arise in this and similar situations, and the adverse operational effect such defaults could cause, any change in the rules should apply only to applicants who have not been awarded construction permits as of the effective date of the change in the rules.

Application of a Holding Period to  
Grants Outside the Comparative Hearing Process

10. At footnote 5 and paragraph 17(e) of the Further Notice, the Commission seeks comments on whether it should open a

new proceeding to consider the reinstatement of some form of anti-trafficking rule<sup>3/</sup> that would apply to all broadcast authorizations, including those obtained through assignments or transfers. The FCBA offers the following observations on this matter.

11. As the Commission recognizes, the reimposition of a general anti-trafficking rule is not part of the hearing reform program which has been the focus of this proceeding. Indeed, because prospective station assignees and transferees, unlike hearing applicants, do not make special commitments with respect to integration into management or media diversity, there is no need to require them to maintain ownership for any period of time to ensure that promises are kept. Consequently, at this time there appears to be no rationale for instituting a rulemaking looking towards reimposition of the anti-trafficking rule. In 1982 the Commission found that the three-year rule "prohibits a willing buyer ready to pay the market price from taking over the station, while forcing the seller to continue operation of a facility it no longer desires or cannot support." Transfer of Broadcast Facilities, 52 R.R.2d at 1082. We know of no reason why this reasoning has changed in the ensuing 11 years.

12. Further, a new anti-trafficking rule is likely to be difficult to administer. Time and money will be needed to process the many requests for waivers and exceptions that can be

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<sup>3/</sup> The "three-year" rule was eliminated in 1982. See Transfer of Broadcast Facilities, 52 R.R.2d 1081 (1982), recon. granted in part, 99 F.C.C.2d 971 (1985).

expected. Such requests might arise, for instance, in situations where stations are subject to receivership, divorce or bankruptcy proceedings. Without a rule waiver, fiduciaries would have to turn down offers exceeding the original purchase price, thereby complicating the sale of a distressed facility. Waiver requests also can be expected in merger-and-acquisition situations involving companies with broadcast subsidiaries. It is conceivable that billion dollar transactions would be stalled pending FCC review of whether that portion of the sale or merger proceeds attributable to the broadcast facilities represent an illegal "profit" vis-a-vis the original purchase price. These types of questions have been outside the FCC's purview for 11 years. Unless the Commission has a compelling public interest reason for re-regulating in this area, and none is expressed in the Further Notice, it would not appear advisable for the agency to impose upon itself or the broadcast industry such a new and burdensome regulatory scheme.<sup>4/</sup>

#### CONCLUSION

For the reasons set forth above, the FCBA favors an extension of the holding period for broadcast licenses, but only in the limited context of grants made in reliance on comparative

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<sup>4/</sup> Radio financial markets, which are only now adjusting to changes in the Commission's duopoly rules, would also be affected by any change in the mandatory holding period. Creating a new shock to the broadcast financing system, without a compelling justification, is not in the public interest.

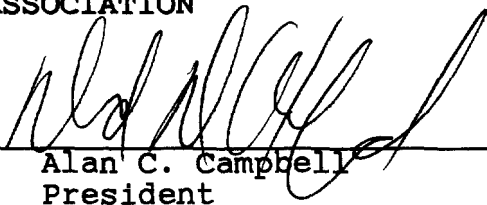


promises in the hearing process. In that instance, the extended holding period will contribute to maintaining the integrity of the hearing process by insuring that promises are not lightly made. In other circumstances, the FCBA submits that no compelling reason for the imposition of any holding period has been advanced and, absent such a compelling justification, the adoption of new rules is not justified.

Respectfully Submitted,

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October 13, 1993

CERTIFICATE OF SERVICE

I, Valerie A. Mack, hereby certify that I have this 13th day of October, 1993, mailed by first class United States mail, postage prepaid, copies of the foregoing "COMMENTS ON FURTHER NOTICE OF PROPOSED RULEMAKING" to the following:

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